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Supreme Court, U.S.
FILED
09-309 SEP 8 - 2009
OFFICE OF THE CLERK

No. 09-

IN THE

Supreme Court of the United States

tw telecom of oregon llc,

Petitioner,

v.

City of Portland,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding, in conflict with several circuits, that a local government's regulation of a telecommunications carrier's access to public rights-of-way violates Section 253 of the Telecommunications Act of 1996 only if it entirely prevents the carrier from operating in the local market?

2. Did the Ninth Circuit err in holding, in conflict with several circuits, that percentage-of-gross-revenue fees imposed under a municipal franchise ordinance for use of public rights-of-way are "taxes," and therefore that federal jurisdiction to hear challenges to such fees under section 253 of the Telecommunications Act of 1996 was divested by the Tax Injunction Act of 1937?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Qwest Communications Corporation and Qwest Corporation, parties below, are being served as Respondents herein.

tw telecom inc., a publicly traded company, owns 100% of tw telecom holdings inc., which owns 100% of Petitioner tw telecom of oregon llc. (formerly Time Warner Telecom of Oregon LLC)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner tw telecom of oregon llc (formerly Time Warner Telecom of Oregon LLC) ("TWTC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The District Court opinion partially invalidating the franchise ordinance at issue in this case is published at *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F. Supp. 2d 1084 (D. Or. 2006). (Appendix B.)[1] The Court of Appeals opinion affirming in part and reversing in part the District Court is available at 322 Fed. Appx. 496, 2009 WL 965816 (9th Cir. 2009). (Appendix A.)

JURISDICTION

The Court of Appeals entered its judgment on April 8, 2009. On June 25, 2009, Justice Kennedy extended the time for filing a petition for a writ of certiorari until and including September 5, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] A related opinion addressing claims by Qwest Corporation is at *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F. Supp. 2d 1103 (D. Or. 2006).

RELEVANT STATUTORY PROVISIONS

This case involves Section 253 of the Telecommunications Act of 1996 (Pub. L. 104-104, 110 Stat. 56) ("Telecom Act"), entitled "removal of barriers to entry." Section 253(a) provides:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a).

Section 253(c) of the Act provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Id. § 253(c).

This case also involves the Tax Injunction Act of 1937, 28 U.S.C. § 1341, which provides that federal courts generally "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Appendix C reproduces the relevant portions of the City of Portland, Oregon (the "City" or "Portland") franchise ordinance challenged in this case, and the relevant portions of the Portland City Charter.

STATEMENT OF THE CASE

This case concerns a claim that Portland discriminates against certain telecommunications carriers in granting access to municipal rights-of-way, in violation of the Telecom Act.

A. The Telecom Act and federal preemption of state and local regulation

With the Telecom Act[2], Congress introduced a "fundamental[] restructur[ing] [of] local telephone markets." *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 371 (1999). The Telecom Act is designed to facilitate entry and competition by new telecommunications providers. To advance this purpose, the Telecom Act requires that "incumbent" carriers interconnect existing facilities with those of new entrants, and that state and local governments eliminate obstacles to competition. *Id.*

This case involves Section 253 of the Telecom Act, which "prohibits state and local regulation that impedes the provision of 'telecommunications service,'" *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 491 (2002), and targets state and local regulations that give preferential

[2] The 1996 Telecom Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

treatment to incumbent telecommunications providers and impede competition by new entrants.

Section 253(a) preempts any state or local regulation that would "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Congress in Section 253(c) preserved the power of state and local governments "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis . . ." 47 U.S.C. § 253(c).

TWTC is a competitive local exchange carrier ("CLEC") authorized to provide telecommunications services by the Federal Communications Commission ("FCC") and the Oregon Public Utility Commission. TWTC challenges Portland's regulations of telecommunications providers on the ground that they impede competition in violation of Section 253.

B. Portland regulates telecommunications providers through franchise ordinances

To provide services, telecommunications carriers must have access to municipal rights-of-way to lay conduit and fiber, and to place facilities. Before granting access to the municipal rights-of-way, the City requires carriers to obtain a franchise. All franchises must be adopted as ordinances by the Portland City Council and, as such, have the force of law.[3] Violations are punishable

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[3] *See* 7 Qwest Excerpts of Record (Olson ELI Depo.) at 8:6-13; City Charter ("Charter") § 10-207, Appendix C, at 48a.

by civil and criminal penalties, including fine and imprisonment.[4]

C. Terms of the franchise ordinances

1. The fee requirements

The City conditions a grant of franchise on payment of a recurring annual fee, which the City designates as "compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City."[5] These fees vary dramatically among carriers.[6] Carriers needing a general right of access to rights-of-way for placing facilities are subject to three different methods of compensation unilaterally dictated by the City. CLECs, such as TWTC, are charged 5% of all gross revenues.

The City owns a CLEC called the Integrated Regional Network Enterprise ("IRNE"), which provides telecommunications services to educational and governmental customers in the larger Portland area in competition with TWTC. IRNE has a uniquely favorable fee arrangement. Although IRNE's franchise fee provision nominally mirrors the fee provisions required

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[4] Charter § 2-107, Appendix C, at 48a.

[5] TWTC Franchise § 3.1, Appendix C, at 44a-46a; Addendum to Qwest Ninth Circuit Brief 1 (QCC Franchise).

[6] *See* TWTC Franchise § 3.1(A), Appendix C, at 44a-46a; Addendum to Qwest Ninth Circuit Brief 1 (QCC Franchise) § 3.1(A), 3 (IRNE Franchise) § 3(A)(1)(b), 8 (QC Temporary Revocable Permit) § c.l.

of other CLECs such as TWTC[7]—5% of its gross revenues—the City actually allows IRNE to make significant deductions from its "gross revenues" calculations. Specifically, IRNE exempts from "gross revenues" all revenues earned from the sale of what it calls its "INET" products and services.[8] The deduction of INET revenues by IRNE results in a huge reduction of fees. Thus, City-owned IRNE pays a mere fraction of the franchise fee it would have to pay if it were any other CLEC.

The City's rationale for allowing IRNE to deduct the INET revenues is that IRNE is just reselling those services; however, no other provider is allowed to deduct revenues received from resale of services. The City requires TWTC and other CLECs to include all revenue except "uncollectibles" regardless of whether the revenue is generated from reselling services or using facilities provided by other carriers.[9]

Also, the City charges Qwest Corporation ("QC"), the incumbent local exchange carrier in Portland, a utility license fee of 7% of its exchange access revenue,[10] instead of the franchise fee of 5% of gross revenue from all services that it charges TWTC. This difference is

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[7] Addendum to Qwest Ninth Circuit Brief 3 (IRNE Franchise) § 3(A)(I)(b).

[8] The INET is a communications network constructed by the cable company Comcast for the benefit of governmental and educational entities.

[9] TWTC Excerpts of Record 1 (Soloos email), 22 (Thomas Decl. I), at ¶ 7.

[10] These are basically charges for providing dial tone.

significant.[11] It puts TWTC at a competitive disadvantage with respect to the incumbent, QC.

The record shows that, in addition to being discriminatory, the City's rights-of-way fees are arbitrary. The City has never conducted a study to value its rights-of-way. It has never estimated the costs of maintaining the rights-of-way. It has neither obtained information nor conducted an analysis that would be necessary to determine what fair and reasonable compensation for the use of its rights-of-way would, in fact, be. And it has never evaluated the impact the franchise fees have on the regulated carriers, or the effect of the discriminatory fees on the carriers' ability to compete with one another.[12]

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[11] At the rate of 7% of exchange access revenue, QC paid $333,053.84 to the City for the month of January 2005. TWTC Excerpts of Record 342 (Barton Decl.), at ¶6. Based on this amount, it was estimated that QC would pay approximately $4 million to the City for FY 2005. *Id.* In comparison, if QC were charged the same franchise rate as is TWTC – 5% of gross revenue – it was estimated that QC's total franchise fees to the City for FY 2005 would be approximately $6.8 million. TWTC Excerpts of Record 342-3, at ¶7. This is more than a $2.5 million difference. *Id.* To further highlight the differing effects of the 5% of gross revenue fee versus the 7% of exchange revenue fee, at the rate of 5% of gross revenue, TWTC paid $213,333.63 to the City for FY 2004. TWTC Excerpts of Record 6-7 (Thomas Decl. II), at ¶5. If TWTC were charged the same franchise rate as is QC–7% on exchange access revenue–TWTC would have paid $120,955.13. *Id.* This is a $92,378.50 difference. *Id.*

[12] 8 Qwest Excerpts of Record (Olson Depo. I) at 69:21-70:9, 70:18-21, 9 (Soloos Depo. I) at 94: 12-21.

David Olson, the director of the City's Office of Cable Franchise and Management, admitted that the rights-of-way fees have "no necessary relations to impact on the right-of-way."[13]

This is not a case where differing use of the public rights-of-way justifies differing fees. There is simply no justification for the discriminatory fees that the City charges TWTC versus those it charges IRNE. Nor is there a difference in the way TWTC uses the rights-of-way versus the way QC does that would justify charging TWTC more than it charges QC. If anything, because QC's network is ubiquitous throughout the City and TWTC's network is fairly limited, QC's use of the rights-of-way is necessarily much greater than TWTC's. If TWTC were truly competing in a "fair and balanced legal and regulatory environment" (*In re California Payphone Ass'n*, 12 F.C.C.R. 14,191 at 14,206, ¶31 (1997)) it would be charged the same rate as QC, or even less.

2. The in-kind requirements

The City's Charter gives it expansive rights to demand conduit or fiber in exchange for a franchise. Charter sections 2-105(a)(24) and 10-210(d) authorize the City to "**require** conduits under the streets" in exchange for access to the streets.[14] Some of the franchise agreements, such as TWTC's, give the City discretion to require additional facilities at any time in

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[13] 7 Qwest Excerpts of Record (Olson ELI Depo.) at 31 :9-32:3.

[14] Appendix C, at 47a, 50a (emphasis added); *see* 9 Qwest Excerpts of Record (Soloos Depo. I) at 3.0:6-14.

the future.[15] The City exercises this "in-kind" contribution authority without fail, making such donations to the City a condition of every franchise, except the one the City granted to its own CLEC, IRNE.

Whenever a carrier plans to place facilities in the public right-of-way, it must advise the City. The City tells the carrier whether it wants in-kind facilities along the same route. The City then donates to IRNE the in-kind facilities demanded from franchisee carriers.[16]

Stated simply, if a telecommunications carrier wants to use Portland's rights-of-way, it must not only pay a franchise fee under the City's discriminatory regime, but it must also give the City fiber or conduit for IRNE. Otherwise, the City will not grant access. The City maintains no record of any liability on IRNE's books for any of these in-kind facilities given to IRNE.[17]

The contributions have not been trivial. According to the City's estimate, 11% of the conduit segments that

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[15] *See* 33 Qwest Excerpts of Record (QC Concise Statement of Material Facts ("QC CSMF")) ¶ 7; 29 Qwest Excerpts of Record (Soloos Depo. II) at 22:16-24:13; TWTC Franchise § 9.1, Appendix C, at 46a; 5 Addendum to Qwest Ninth Circuit Brief (TCG Franchise) § 9.1, 6 (McLeodUSA Franchise) § 9.1, 7 (Tyco Franchise) § 9.1.

[16] 33 Qwest Excerpts of Record (QC CSMF) ¶¶ 6, 7, 29 (Soloos Depo. II) at 11:18-12:16, 15:4-20, 16:24-18:7; 1 Addendum to Qwest Ninth Circuit Brief (QCC Franchise) §9.1; TWTC Franchise §9.1, Appendix C, at 46a.

[17] *See* 33 Qwest Excerpts of Record (QC CSMF) ¶ 14; 30 (Gray Depo. II) at 52:3-25, 31 (Thatcher Letter).

IRNE uses today were obtained from other carriers. This 11% does not include an as-yet-unused pool of in-kind assets that the City has stockpiled for use in the future at IRNE's discretion. Most of the in-kind assets are in Portland's downtown area, where construction costs are highest.[18]

The City admits that IRNE built its infrastructure at a "fraction of the cost normally associated with such a project" because of the availability of the in-kind facilities.[19]

As with the franchise fees, the City demands widely divergent in-kind compensation from the carriers. The City does not value or offset the amount of these differing payments of fiber or conduit. As a result, each carrier pays a different amount, contributing whatever in-kind conduit and fiber the City demands.

3. TWTC has been excluded from certain market sectors as a result of the city's fee structure and in-kind contribution requirements

The City admits that IRNE's prices for its telecommunications services are substantially reduced because it does not have to recover the costs of in-kind

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[18] *See* 33 Qwest Excerpts of Record (QC CSMF) ¶¶ 8, 9, 30 (Gray Depo. II) at 34:21-35:10; *see also* 27 Qwest Excerpts of Record (Gray Decl.) ¶ 18, 28 (Olson Depo. II) at 20:19-23,23:21-24:8, 8 (Olson Depo. I) at 67: 14-18, 16 (Jesuale Depo., Ex. 99).

[19] 8 Qwest Excerpts of Record (Olson Depo. I) at 86:16-22, 19 (Peterson Memo.) at 000099.

facilities in its prices.[20] Absent this preferential treatment, IRNE would have to build out its infrastructure just like other carriers and include the cost of this infrastructure in its prices. IRNE's representatives estimate that not doing so allows IRNE to offer its services at prices that are 20% to 40% below its competitors' prices. This estimate is low; IRNE's prices are in fact closer to 50% below what they would be if IRNE were required to recover its actual costs, as its competitors are.[21]

Similarly, if IRNE did not have preferential treatment from the City in being allowed to exclude almost 90% of its revenues from the gross revenues on which it pays a franchise fee, and instead had to pay the same franchise fees that TWTC and other CLECs pay, IRNE's prices would have to be higher than they are.

As a direct result of the City's discriminatory fee structure and its abuse of its franchising power to benefit IRNE, TWTC has lost business and has been unable to compete against IRNE for governmental and educational business in Portland. It has effectively been prohibited from providing telecommunications services to those markets in Portland.[22]

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[20] 30 Qwest Excerpts of Record (Gray Depo. II) at 52:3-23.

[21] *See* 8 Qwest Excerpts of Record (Olson Depo. I) at 86:1-13, 33 (QC CSMF) ¶ 26, 35 (Fitzsimmons Decl.) ¶¶ 6, 7, 12, 13, 32 (Jesuale email).

[22] *See* 20 Qwest Excerpts of Record (Nicholson Decl.) ¶ 6.

D. The case below

On September 28, 2004, TWTC and another CLEC, Qwest Communications Corporation ("QCC"), brought suit against the City in the United States District Court for the District of Oregon, for declaratory judgment and injunctive relief. They alleged that the City's practice of requiring free conduit or fiber from them and from other telecommunications providers in exchange for access to rights-of-way, coupled with its discriminatory fee scheme and other onerous regulatory requirements, violated Section 253 of the Telecom Act. On September 2, 2005, QC, the incumbent local exchange carrier operating in the Portland area, filed suit, claiming that the City's demand for free fiber and conduit from other telecommunications carriers violated Section 253. The two suits were later consolidated.

The parties cross-moved for summary judgment and the District Court issued two orders denying in part and granting in part the respective motions of TWTC, QCC, QC, and the City. The parties appealed.

While the appeal was pending, the Ninth Circuit sitting en banc decided *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2860 (2009). In *Sprint Telephony*, the Ninth Circuit overruled in part its prior decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied sub nom. City of Tacoma v. Qwest Corp.*, 534 U.S. 1079 (2002), thereby rejecting its earlier view that a local ordinance violates Section 253(a) of the Telecom Act if it *may* have the effect of prohibiting service.

In rejecting *City of Auburn*, the Ninth Circuit in *Sprint Telephony* stated that a plaintiff suing a municipality under Section 253(a) must now show *actual or effective* prohibition, rather than the mere possibility of prohibition, in order to state a claim. 543 F.3d at 578 (*citing Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007)). The Ninth Circuit did not directly address what type of action by a locality has the "effect of prohibiting . . . telecommunications service." 47 U.S.C. § 253(a). It was not required to make such a determination in *Sprint Telephony*, because the court found that the ordinance being challenged on its face could have been applied in a way that did not prohibit the provision of service.

The Ninth Circuit panel in this case ("the Panel") subsequently issued a non-published opinion, ruling, without analysis or explanation, that (1) "the in-kind requirements Qwest challenges" . . . "do not have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation," citing the recent *Sprint Telephony* decision, 543 F.3d at 578; (2) the per-foot fee charged to QCC does not have the effect of prohibiting QCC from providing service; (3) the 5% gross revenue fees imposed on TWTC are taxes with the meaning of the Tax Injunction Act, and therefore the district court was deprived of jurisdiction to review the fee, citing *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 (9th Cir. 2006); and (4) the district court erred in determining that TWTC's in-kind requirements violated § 253 because these

requirements did not have the effect of prohibiting the provision of services. (Appendix A, at 3a-5a)[23]

The Panel failed to address TWTC's, QCC's, and QC's challenge to the City's discriminatory practice of requiring the provision of in-kind facilities from other carriers and then donating those facilities to IRNE, allowing it to underprice its competitors. It also failed to examine the cumulative effect of the challenged laws (both the fee and in-kind contribution provisions) in combination.

While the Panel did not state a test for what constitutes an effective prohibition, it did suggest that a local action must completely prevent a carrier from operating before it runs afoul of Section 253(a). Thus, it appears that the Ninth Circuit would require a non-incumbent provider such as TWTC to be completely driven out of the local market by discriminatory regulations and to suffer significant losses before it could show that local regulation violates Section 253(a). As shown below, this conclusion is contrary to Congress' intention in adopting Section 253(a).

[23] The Panel also ruled on certain state contract law issues relating to interpretation of the franchise language.

REASONS FOR GRANTING THE PETITION

A. Must carriers such as TWTC be completely driven out of a market by local regulations in order to show a violation of Section 253?

1. As a result of the Panel's decision, the circuits are split on what it means to have the "effect of prohibiting" telecommunications service under Section 253(a)

Certiorari should be granted because the Court of Appeals erroneously limited the preemptive effect of an important part of the Telecom Act and, as a result, created a significant conflict in the courts of appeals. This Court's intervention is required to settle and provide uniformity to this important area of federal law.

Relying on its recent decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, the Panel held that the in-kind requirements that TWTC, QC, and QCC challenged "do not have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation" and that the district court erred in determining that the City's in-kind requirements violated Section 253 because these requirements did not have the effect of prohibiting the provision of services. (Appendix A, at 3a-5a.) In short, the Panel holds that a local action must completely prevent a carrier from operating before it runs afoul of Section 253. *Id.*

This is in direct conflict with the standard adopted by the First, Second, Eighth, and Tenth Circuits, each

of which generally agrees with the FCC's decision in *In re California Payphone Ass'n*, that a local law "has the 'effect of prohibiting' the ability of any entity to provide" telecommunications service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." 12 F.C.C.R. at 14,206 ¶ 31. *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15, 18 (1st Cir. 2006) (the relevant inquiry is whether "the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment"; *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003) (same); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) (the relevant inquiry under Section 253(a) is whether a regulation "would 'materially inhibit' the provision of [telecommunications] services"); *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d at 533 (a section 253(a) plaintiff "need not show a complete or insurmountable prohibition, . . . but it must show an existing material interference with the ability to compete in a fair and balanced market").[24]

Thus, in those other circuits local regulations that substantially raise a private carrier's cost of doing

[24] Other differences exist among the circuits in the interpretation and application of Section 253. These differences (discussed in detail in the Solicitor General's brief as amicus curiae submitted in May 2009 in response to petitions for writs of certiorari in *Level 3 Communications, LLC v. City of St. Louis*, No. 08-626, and *Sprint Telephony PCS, L.P. v. San Diego County*, No. 08-759) create further uncertainty and inconsistency in the regulation of telecommunications services throughout the country.

business in the city have been preempted by Section 253(a) (*Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1271), as have those that create competitive inequities in the market (*N.J. Payphone Ass'n, Inc. v. Town of W. New York*, 299 F.3d 235, 247 (3d Cir. 2002) (unlawful to "create a set of rules the purpose of which is to select one company over others for preferential treatment"), *TCG N.Y., Inc.*, 305 F.3d at 79 (preferential treatment of incumbent provider unlawful)). Similarly, a fee that is unrelated to a company's use of city rights-of-way has been held to violate § 253(a) of the Act as an economic barrier to entry. *Puerto Rico*, 450 F.3d at 18, 22 ("fair and reasonable" compensation must be "related to the actual use of rights-of-way"; 253(a) bars not only direct barriers but also any requirements that, if imposed cumulatively by numerous municipalities, would "significantly increase a [provider's] costs and reduce the profitability of its operations"); *N. J. Payphone Ass'n, Inc. v. Town of W. New York*, 130 F.Supp.2d 631, 638 (D.N.J. 2001) ("Plainly, a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry") *aff'd*, 299 F.3d 235 (3d Cir. 2002); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F.Supp.2d 805, 817 (D. Md. 1999) ("local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way"), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000).

Here, the City's franchise fee regime results in substantial costs and significant competitive inequities

for TWTC and other carriers. It has put TWTC and other carriers at a competitive disadvantage vis-à-vis the City-owned CLEC, IRNE. It has also put TWTC at a competitive disadvantage vis-à-vis the incumbent local exchange carrier, QC, and other CLECs that use QC's facilities. It has effectively blocked TWTC from the governmental and educational markets in Portland. Notwithstanding the City's discriminatory treatment of TWTC and other carriers, the Ninth Circuit determined that TWTC cannot show a violation of Section 253 because it was not completely prevented from operating in Portland. This result eviscerates Section 253 and creates a conflict with other circuits that have interpreted the Telecom Act to require a material, but not a complete, inhibition on competition. This split on an important issue of federal telecommunications policy requires review by this Court.

2. This Court should address the circumstances under which a local regulation has the "effect of prohibiting" the provision of service under the Telecom Act

This Court should clarify the proper interpretation of Section 253(a) and the standard for establishing that a local requirement has the "effect of prohibiting" the provision of a telecommunications service. The language, structure, and legislative history of section 253(a) all lead to the conclusion that a carrier need not show a complete inability to operate to prevail.

TWTC contends that the proper test for determining whether a local requirement has the "effect of prohibiting" the ability of a carrier to provide

"any . . . telecommunications service," 47 U.S.C. § 253(a), is whether the requirement imposes costs (such as higher fees and in-kind contribution requirements) on one carrier that result in price increases for that service, while simultaneously decreasing a competitor's costs (through lower fees or provision of free facilities). Obviously, a local government that discriminates among competitors in the imposition of conditions on the use of public rights-of-way interferes with a carrier's right to "compete in a fair and balanced market." *In re California Payphone Ass'n*, 12 F.C.C.R. at 14,206 ¶ 31. This is particularly true when the local government interferes in the market to give substantial advantages to its own CLEC, as the City has done to favor IRNE. Its franchising scheme and its actions have resulted in both TWTC and QC losing customers and has effectively foreclosed TWTC from serving the governmental and educational customers targeted by IRNE. Clearly, the effect of a local action rises to the level of an "existing material interference" (*id.*) when it results in a loss of customers or a foreclosure from a segment of the market, as it has done here.

The text of the statute does not support the Panel's conclusion that a complete exclusion from the local market is a necessary prerequisite for finding a local regulation in violation of Section 253(a). The statute provides that no state or local regulation "may prohibit or have the effect of prohibiting the ability of **any** entity to provide **any** interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). The result reached by the Panel in this case construed "any . . . telecommunications service" to mean "**all** telecommunications service" – i.e., a local

regulation is barred by the Telecom Act only if it prohibits **all** service by a particular carrier. But this Court has interpreted "any" to mean not "all," but "one" or "some": "'[r]ead naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'" *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 128 S. Ct. 831, 835-36 (2008) (*quoting United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Thus, the plain statutory language indicates that a local regulation runs afoul of Section 253(a) if it prohibits one or some service by a carrier. In this case TWTC showed that Portland's regulations prohibited "some" services: they completely exclude TWTC from the educational and governmental markets and impair TWTC's ability to compete in other markets. The Ninth Circuit erred in holding that TWTC had no claim because it was not entirely excluded from all sectors of the local market.

The Panel's interpretation of Section 253(a) further makes it impossible to give effect to Section 253(c), which protects the right of local governments to receive fair and reasonable compensation for use of rights-of-way, but only as long as the compensation is "competitively neutral and nondiscriminatory." If Section 253(a) allows the City to impose any burdensome and discriminatory regulation that stops just short of a complete prohibition, then it is impossible to invoke the mandate of Section 253(c) that compensation for use of rights-of-way be neutral and non-discriminatory. By contrast, if the Panel had adopted TWTC's interpretation of Section 253(a) – that a local regulation is unlawful if it puts a particular carrier at a competitive disadvantage – then Section 253(c) could meaningfully be applied to

determine whether the City charges for use of its rights-of-way in a neutral and non-discriminatory fashion. This interpretation would properly give effect to the structure of Section 253. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).[25]

The legislative history of the statute also confirms that Congress intended to bar local requirements that materially increase a carrier's cost and that are applied in a fashion that favors certain competitors at the expense of others. The nondiscrimination and competitive neutrality limitations in section 253(c) were essential to achieving Congress's objective of opening local markets to free and fair competition. Congress believed that discriminatory burdens were the kind of impediment to competition that should be preempted. *See, e.g.*, S. Rep. No. 103-367, at 56 (1994) ("Currently, one barrier to the deployment of competitive networks has been the unequal treatment by certain local governments of incumbent network providers and new entrants in the assessment and collection of local franchise fees in connection with the use of public rights-of-way."); H. Rep. No. 104-204, at 75 (1995) ("The purpose of [a competitive neutrality provision] is to create a level playing field for the development of competitive telecommunications networks. Harmonizing the assessment of fees from all providers is one means of creating this parity."). The Panel's interpretation of

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[25] "[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *Id.* at 133.

Section 253(a) as authorizing any local regulation that stops short of a complete prohibition makes it impossible to put into effect Congress' intent to maintain non-discriminatory fees for use of rights-of-way.

Thus, the text, structure and legislative history of section 253 all confirm that Congress meant to preempt localities from imposing significant financial and other burdens on some carriers and not others, even if the affected carriers are still able to operate. Section 253 does not permit the kind of franchise discrimination in which the City engages. A carrier should not have to be completely forced out of operation before it has a right to challenge a city's regulations.

3. This case is the right vehicle for reviewing the Section 253(a) standard: Distinguishing the *Sprint Telephony PCS* and *Level 3 Communications, L.L.C.* petitions

While this Court during the last term declined to grant a petition for writ of certiorari in two cases[26] concerning the scope of federal preemption of local regulation under Section 253, the legal and procedural posture of the current case distinguish it from those two earlier cases, and render the issue ripe for review.

As noted above, the Panel's holding that a complete bar to competition is a necessary prerequisite to a

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[26] *Level 3 Communications, LLC v. City of St. Louis*, No. 08-626, and *Sprint Telephony PCS. L.P. v. San Diego County*, No. 08-759.

challenge under Section 253(a) puts the Ninth Circuit in conflict with other circuits. That sort of stark conflict was not presented by the *Sprint Telephony PCS* and *Level 3 Communications* cases. The Solicitor General last term concluded, for example, that the Ninth Circuit's *Sprint Telephony PCS* decision "need not be read as confining the application of Section 253(a) to only those legal requirements that completely bar new entry." Solicitor General's Brief in *Level 3 Communications, LLC v. City of St. Louis*, No. 08-626, and *Sprint Telephony PCS. L.P. v. San Diego County*, No. 08-759 ("SG Brief"), at 6.

The Solicitor General meanwhile acknowledged that requiring a telecom provider to prove complete exclusion from the market before it may challenge a local regulation under Section 253(a) – the very holding in this case – "would undermine the federal competition policies that the provision seeks to advance." *Id.* Likewise, the FCC has interpreted Section 253(a) to reach any legal barrier that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re California Payphone Ass'n*, 12 F.C.C.R. 14,206 ¶ 31.

The Panel in this case applied Section 253(a) in a way that both creates a conflict among the circuits, and is at odds with the Solicitor General's and the FCC's interpretation of the statute. Review by this Court is necessary to advance uniformity in federal telecommunications policy.

The procedural posture of this case also supports grant of a writ of certiorari. In its amicus brief last term, the Solicitor General stated that neither the *Sprint Telephony PCS* nor the *Level 3 Communications* case was the correct vehicle for reviewing the section 253(a) standard, because the facts were not particularly well developed in either case. SG Brief at 20-21. This is especially true of the *Sprint Telephony PCS* case, which was a prima facie challenge to the subject ordinance.

This case is different. The carriers in this case fully developed the facts through discovery to show the discriminatory effects of the City's regulatory scheme. The record unequivocally shows that excessive and discriminatory fees, mandatory in-kind contributions, and Portland's favorable treatment of IRNE, have put other carriers at a competitive disadvantage and effectively excluded them from the governmental and educational markets in Portland.

The District Court and the Ninth Circuit in this case applied the *Sprint Telephony PCS* decision in such a manner as to require complete exclusion from the market in order to show a violation of Section 253(a). Whether this interpretation of the Telecom Act is consistent with Congressional intent is now ripe for review by this Court. Continued uncertainty about the proper interpretation of Section 253(a) will enable local governments to impose the kind of discriminatory regulations seen in Portland. And the result will be the frustration of federal competition policy.

B. Are percentage-of-revenue fees under a telecommunications franchise ordinance "taxes" for purpose of the Tax Injunction Act?

Certiorari should be granted for the additional reason that the Panel eviscerated an important part of the Telecom Act when it held that federal jurisdiction was divested by the Tax Injunction Act ("TIA"). The Panel created a conflict among the circuits regarding federal jurisdiction to void excessive and discriminatory local right-of-way fees. This Court's intervention is necessary to settle this important question of federal law and restore uniformity.[27]

Local governments can too easily thwart competition by imposing significant financial burdens on telecommunications providers, particularly where those burdens are imposed unequally. That is why Congress limited local governments to charging only "fair and reasonable compensation" for use of the rights-of-way and provided further that such charges be "competitively neutral and nondiscriminatory." Telecom Act § 253(c). The TIA, enacted in 1937, provides that federal courts generally "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. The Panel in this case held that Portland's percentage-of-revenue fees are "taxes" for purposes of the TIA and not subject to review by the federal courts.

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[27] The §253 cases in which the writ of certiorari was denied last term, *Sprint Telephony PCS* and *Level 3 Communications*, did not concern application of the TIA to the Telecom Act.

As shown below, the language and structure of the Telecom Act demonstrate that Congress believed that excessive and discriminatory local right-of-way fees are not taxes. Moreover, reference to authority from this Court compels the conclusion that the TIA does not apply when a later federal statute—in this case, the Telecom Act—indicates that Congress contemplated federal jurisdiction. And, it was well-established, both before the TIA was adopted and after, that fees for the use of public rights-of-way are usage fees, not taxes.

1. There is a de facto circuit split regarding the application of the TIA to Section 253

Several circuit courts have accepted jurisdiction to resolve claims regarding excessive or discriminatory fees under the Telecom Act. Those courts have not invoked the TIA as grounds to avoid addressing the legality of the fees. The Panel's decision in this case to foreclose federal jurisdiction based on the TIA (Appendix A, at 4a) reflects a split with those other circuits requiring resolution by this Court.

Where it applies, the TIA is "jurisdictional," and "federal courts are duty-bound to investigate the application of the Tax Injunction Act regardless of whether the parties raise it as an issue." *Folio v. City of Clarksburg*, 134 F.3d 1211, 1214 (4th Cir. 1998). The First, Second, Third, Sixth, Tenth, and Eleventh Circuits have exercised jurisdiction to resolve claims that excessive or discriminatory local right-of-way fees violate the Telecom Act, without any suggestion that the TIA is a barrier. *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d at 22-23, *Qwest Corp. v. City of*

Santa Fe, 380 F.3d at 1270-72, *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d at 80, *Bell South Telecom., Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001); *N.J. Payphone Ass'n v. Town of W. New York*, 130 F. Supp. 2d at 638, *aff'd* 299 F.3d 235, *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000), *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d at 817, *vacated and remanded on other* grounds, 212 F.3d 863; *see also Qwest Comm. Corp. v. City of New York*, 387 F. Supp. 2d 191, 194 (E.D.N.Y. 2005), *T.C. Systems, Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 489 (N.D.N.Y. 2003).

The Ninth Circuit itself has issued three prior opinions addressing on the merits claims that local usage fees were preempted by Section 253, again without any suggestion that the TIA blocks federal jurisdiction: *City of Auburn*, 260 F.3d at 1175-80, *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1242-45 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005), and *Qwest Communs. Inc. v. City of Berkeley*, 433 F.3d 1253, 1257-59 (9th Cir. 2006).

The extensive body of precedent applying Section 253 to excessive local right-of-way fees is strong evidence that such actions are not barred by the TIA. The Panels' decision in this case that the TIA bars a challenge to the gross revenue fees conflicts with those cases and requires review by this Court.

2. The language and structure of the Telecom Act show that compensation for the use of public rights-of-way is not a "tax"

It is clear from the language and structure of the Telecom Act that Congress believed that excessive and discriminatory right-of-way fees are not taxes.

First, Section 253(c) addresses "compensation" received by local governments in exchange for the use of rights-of-way. Congress' use of the term "compensation" was intentional. The Telecom Act requires linkage between the burden imposed by the carrier's use of the right-of-way and the level of compensation the carrier pays. Had Congress intended the payment for use of a right-of-way to be considered a "tax," no such linkage would have been required, and section 253(c) would not have employed the term "compensation."

In addition, because the Telecom Act states that it does not impair or supersede local taxes, while at the same time regulating fees for use of rights-of-way, those fees must not be "taxes." Section 601(c)(2) of the Telecom Act states that the Act shall not be "construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation . . . ." 110 Stat. 143 (codified at note to 47 U.S.C. § 152). But in Section 253 Congress unequivocally expressed its intent to preempt local laws that impose excessive and discriminatory fees for use of public rights-of-way that have the effect of prohibiting the provision of telecommunications service. The only

way to harmonize Sections 601 and 253 is to conclude that Congress believed that such fees are not taxes.

Since Section 601 and the TIA have the same purpose—preservation of local revenue—it follows that the term "tax" has the same meaning in Section 601 and the TIA, and that a fee that is not a tax under Section 601 is likewise not a tax under the TIA. The reverse would also be true. In order to read Section 601 consistently with the TIA, it is necessary to conclude that local right-of-way fees imposed on telecom carriers cannot be "taxes."

The Panel's decision to the contrary eviscerates section 253(a). If a locality is permitted to impose financial burdens in the guise of a tax, Congress's intent to promote competitive entry would be thwarted. A saving clause such as Section 601 of the Telecom Act – which disclaims an intent to impair or supersede local taxes — cannot be construed in a way that would defeat the purpose of the Telecom Act. *See United States v. Locke*, 529 U.S. 89, 106 (2000) ("We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.") *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (savings clause does not apply to claims that are inconsistent with preemptive provision; "'the act cannot be held to destroy itself'") (citation omitted); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("we do not believe Congress intended to undermine this carefully drawn statute through a general savings clause").

This case exemplifies how the Panel's ruling defeats the will of Congress. Because of Portland's regulatory

scheme, TWTC has lost customers and has been effectively excluded from the local governmental and educational market. These are exactly the kinds of impediments to entry that Congress meant to preempt with section 253(a). Section 601 and the TIA cannot be construed to permit a locality to accomplish this prohibited result. The only way to harmonize these provisions is to conclude that fees imposed for the use of the rights-of-way by telecommunications carriers are not taxes.

Moreover, the Panel's ruling would render section 253(c) surplusage. If right-of-way fees imposed on telecommunications carriers are taxes and thus not subject to section 253(a), there would have been no need to impose a requirement in Section 253(c) that compensation for the use of rights-of-way be "fair and reasonable" and "competitively neutral and nondiscriminatory." 47 U.S.C. § 253(c). The inclusion in Section 253 of subsection (c) makes clear that excessive and discriminatory right-of-way fees are subject to preemption under subsection (a) and hence are not taxes.

The language, structure, and purposes of the Telecom Act thus refute the Panel's ruling that percent-of-revenue local fees for the use of public rights-of-way are "taxes."

3. Congress contemplated federal jurisdiction for Section 253 claims

The TIA does not apply when a later federal statute, such as the Telecom Act, indicates that Congress contemplated federal jurisdiction. *SEPTA v.*

Pennsylvania Pub. Util. Comm'n, 802 F. Supp. 1273 (E.D. Pa. 1992). *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), establishes the standard for determining whether a later-enacted statute supports federal jurisdiction that would otherwise be barred by the TIA. An "unequivocal statement" of intent to create an exception to the TIA is not required. 425 U.S. at 472-73. Instead, if the later statute and its legislative history show that Congress "contemplated" that certain actions can be brought in federal court, the TIA does not apply. *Id.* at 473.

The Telecom Act is a later law that establishes federal policy and specifically restricts state and local authorities from requiring telecommunications carriers to pay excessive and discriminatory fees for the use of public rights-of-way. Because Congress expressed a specific intent to limit such local actions, the TIA's policy of preventing federal interference with local fiscal operations is inapplicable.

The legislative history of the Telecom Act confirms that Congress intended federal courts to have jurisdiction in cases such as this. It specifically addresses the forum for claims that localities exceeded their authority under section 253(c)—precisely the claim that TWTC has made in this case. Senators Feinstein and Gorton, the principal sponsors of the amendment to remove FCC authority to preempt violations of section 253(c), expressly stated that the proper forum to resolve those issues is the "Federal court," 141 Cong. Rec. S8171 (daily ed. June 12, 1995) (statement of Sen. Feinstein), and "the Federal district court," 141 Cong. Rec. S8213 (daily ed. June 13, 1995) (statement of Sen. Gorton).

The TIA cannot be construed to bar federal jurisdiction over Section 253 claims, which Congress intended to be resolved in federal court. *See Moe*, 425 U.S. at 473 (legislative history indicated that Congress "contemplated" that statute would permit certain claims to be brought in federal court).

4. The TIA does not apply to user fees

The TIA does not by its terms apply to Portland's 5% right-of-way fee. The words of the TIA – "tax" and "assessment, levy or collection" – are terms of art that must be construed in accordance with their established legal meaning, particularly as it existed when the TIA was enacted in 1937.

As shown below, a tax has long been understood to be distinct from a user fee, and for this reason it was well settled by 1937, when the TIA was adopted, that a fee for the use of public rights-of-way was not a tax. The City's 5% right-of-way fee is not a tax under this established doctrine. This conclusion is particularly warranted because (1) the TWTC franchise refers to the charge as "compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City,"[28] not a tax, and (2) the franchise requires, as additional compensation, the provision of in-kind facilities,[29] which is not characteristic of a tax.

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[28] TWTC Franchise, § 3.1 (Appendix C, at __).

[29] Charter § 2-105(a)(24), § 10-210(d) (Appendix C, at __).

Under the common understanding of the term, a tax is not a charge for a benefit bestowed. "A tax is not an assessment of benefits." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937). A long line of cases have held that a fee that is paid to receive a service or good from the government is not a tax. *See Keokuk Northern Line Packet Co. v. City of Keokuk*, 95 U.S. 80, 85 (1877) (fee imposed for landing at a city wharf was not a tax because wharfage was a service which a vessel may use or not at its election), *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 97 (1893) (local fee for installing utility poles in rights-of-way not a tax but "more in the nature of a charge for the use of property belonging to the city"), *Western Union Tel. Co. V. Borough of New Hope*, 187 U.S. 419, 427 (1903) (charge imposed for maintaining utility poles in public rights-of-way not a tax); *see also, National Cable TV Ass'n v. United States*, 415 U.S. 336, 340-41 (1974) (a tax can be levied arbitrarily and in disregard of the benefits it bestows on the taxpayers; whereas a fee "is assessed in response to a voluntary request and is 'a grant which . . . bestows a benefit on the applicant, *not* shared by other members of society.'").

Also, under the TIA, user fees have been held not to be taxes. *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956, 962-963 (9th Cir.), *cert. denied*, 129 S. Ct. 56 (2008) (payment to obtain a "special organization" license plate "is more akin to a contractual debt than a state imposed tax"; TIA does not bar jurisdiction), *ACLU of Tennessee v. Bredesen*, 441 F.3d 370, 372-75 (6th Cir.), *cert. denied*, 548 U.S. 906 (2006) (fee for specialty license plates held to be "most closely analogous to payments for simple purchases from the government" and not

taxes under the TIA, even though part of the revenue was used to benefit the public at large), *Lipscomb v. Columbus Muni. Separate School Dist.*, 269 F.3d 494, 500 (5th Cir. 2001) (attempt to invalidate leases of state land not barred by TIA because "lease obligations are a creature of contract, not a mandatory obligation imposed by the state as taxes are.").

Here, the franchise fee payments by TWTC to the City are more akin to contract payments than to a tax. The City's right-of-way management fees are a quid pro quo for benefits received. The fact that the City's assessments are analogous to a demand for rent is significant. When government is assessing a franchise fee, as it does when it leases access to its rights-of-way, the fees it charges are not taxes. This is because the government is exacting charges for a specific benefit granted to a specific user.

Under the Panel's decision, the rent a state or local government receives for use of a publicly-owned stadium, convention hall, or other public building would be a tax, as would the proceeds from sale of surplus property, if the money were placed in the government's general fund. *See Qwest Corp. v. City of Surprise*, 434 F.3d at 1183-84 (cited by the Panel, Appendix A, at 4a). Such a result would be absurd. Moreover, under the rule adopted by the Panel, a city could avoid the Section 253(c) restrictions on the compensation it can charge for use of public rights-of-way by simply paying the fees into the City's general fund. The District Court in *Qwest Commc'ns Inc. v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D.Cal. 2001), got it right: such a rule "would vitiate the preemptive purpose of the [Telecom Act] because

federal courts would have to abstain, pursuant to the TIA, every time there is a challenge that a fee violates § 253(c)." *Id.* at 1092.

The 5% franchise fee that the City charges TWTC is compensation for the right to use public rights-of-way, and such a fee is not a tax. Because the franchise fee is not a tax, the TIA does not divest the federal courts of jurisdiction to apply Section 253. Review by this Court is necessary to bring uniformity to the federal court's interpretation of the Telecom Act.

CONCLUSION

For the foregoing reasons, TWTC respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 8, 2009

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

Nos. 06-36023, 06-36024, 06-36061.

TIME WARNER TELECOM OF OREGON, LLC, an Oregon limited liability company,

Plaintiff,

and

QWEST COMMUNICATIONS CORPORATION, a Delaware corporation Qwest Corporation, a Colorado corporation,

Plaintiffs-Appellants,

v.

City of Portland, an Oregon municipal corporation,

Defendant-Appellee.

Time Warner Telecom of Oregon, LLC, an Oregon limited liability company,

Plaintiff-Appellant,

Appendix A

and

Qwest Communications Corporation, a Delaware corporation, Qwest Corporation, a Colorado corporation,

Plaintiffs,

v.

City of Portland, an Oregon municipal corporation,

Defendant-Appellee.

Time Warner Telecom of Oregon, LLC, an Oregon limited liability company; Qwest Communications Corporation, a Delaware corporation; Qwest Corporation, a Colorado corporation,

Plaintiffs-Cross/Appellees,

v.

City of Portland, an Oregon municipal corporation,

Defendant-Cross/Appellant.

Argued and Submitted Feb. 4, 2009.
Filed April 8, 2009.

Appendix A

Before: PAEZ and RAWLINSON, Circuit Judges, and JENKINS*, District Judge.

MEMORANDUM**

As clarified at oral argument, Qwest Communications Corporation (Qwest) appeals the district court's judgment in favor of the City of Portland (the City) on Qwest's challenge to the franchise fees based on per-foot usage, and the "in-kind" provisions of its franchise agreement.

Time Warner Telecom of Oregon, LLC (TWT) appeals the district court's judgment in favor of the City on TWT's challenge to the five percent gross revenue fee included in its franchise agreement, and the district court's determination that the services provided by TWT were included within the agreement's definition of "telecommunication services."

The City cross-appeals the district court's determination that TWT's "in-kind" requirement violated the Telecommunications Act.

1. The in-kind requirements that Qwest challenges, which were provided to the City twelve years ago, do not vest the City with broad discretion, and they do not

* The Honorable Bruce S. Jenkins, Senior U.S. District Judge for the District of Utah, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation. *See Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571, 578 (9th Cir.2008) (en banc) (setting the standard for whether a requirement violates the Telecommunications Act). Therefore, these requirements do not violate § 253(a) of the Telecommunications Act.

2. Similarly, because the annual fees imposed on Qwest, calculated on per-foot usage, do not have the effect of prohibiting Qwest from providing telecommunications services, they do not violate § 253(a).

3. The five percent gross revenue fees imposed on TWT by the City were taxes within the meaning of the Tax Injunction Act. *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 (9th Cir.2006) (describing factors to consider in determining whether a fee constitutes a tax). Therefore, we agree with the district court that the Tax Injunction Act deprived it of jurisdiction to review the specific provisions of the telecommunications franchise agreements. *See id.*

4. The district court committed no error when it decided that the information services provided by TWT fell within the broad definition of "telecommunications system" in the franchise agreement. *See Bernard v. First Nat'l Bank of Oregon*, 275 Or. 145, 550 P.2d 1203, 1210 (1976) (holding that under Oregon law, contract terms are presumed to have been used "in their primary and general acceptation" absent evidence to the contrary).

5. Ruling without the benefit of *Sprint*, the district court erred in determining that TWT's in-kind requirements violated § 253 of the Federal Telecommunications Act. Under the standard adopted in *Sprint*, these requirements did not have the effect of prohibiting the provision of telecommunications services.

AFFIRMED IN PART AND REVERSED IN PART. EACH PARTY SHALL BEAR ITS COSTS ON APPEAL.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED MARCH 8, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

No. CV 04-1393-PA, CV 05-1386-PA.

TIME WARNER TELECOM OF OREGON, LLC, and Qwest Communications Corp.,

Plaintiffs,

v.

THE CITY OF PORTLAND,

Defendant.

Qwest Corp.,

Plaintiff,

v.

The City Of Portland,

Defendant.

Appendix B

March 8, 2006.

OPINION

PANNER, District Judge.

Plaintiffs Time Warner Telecom of Oregon (TWT), and Qwest Communications Corp. (QCC) sell telecommunications services in Oregon. Plaintiffs have franchise agreements with the City of Portland (the City) that permit plaintiffs to install and operate telecommunications systems in City streets.

In this action against the City, plaintiffs claim that their franchise agreements violate federal telecommunications law. Plaintiffs also claim that the City illegally competes with them by providing telecommunications services to other governments and public schools.

The parties move for summary judgment. I conclude that the Telecommunications Act of 1996, 47 U.S.C. § 253, preempts the in-kind compensation provisions in TWT's franchise agreement and the most-favored-rate provisions in both franchise agreements. Section 253 does not preempt other provisions of plaintiffs' franchise agreements, or the City's sales of telecommunications services to public schools and other governments.

Appendix B

BACKGROUND[1]

I. The City's Telecommunications Network

The City's fiber optic network, the Integrated Regional Network Enterprise (IRNE), provides the City with voice and Ethernet high-speed data transmission services. IRNE also sells Ethernet high-speed data transmission services to other governments and public schools in the Portland area.

In 2000, the City considered creating a fiber optic network that would provide Ethernet service, to increase speed, capacity, and security. In July 2001, the City received a certificate from the Oregon Public Utility Commission to operate as a competitive local exchange carrier, or CLEC. (Plaintiffs are also certified as CLECs in Oregon.) IRNE obtained a telecommunications franchise agreement with the City. However, IRNE is not a separate legal entity from the City.

Before creating IRNE, the City, working with the Oregon Department of Transportation and the Tri-Metropolitan Transportation District (Tri-Met), formed the Cooperative Telecommunications Infrastructure Committee (CTIC), through an intergovernmental agreement (also known as an IGA). The CTIC members

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1. Statements in the Background are based on the concise statements of facts and the supporting documents submitted in this action and in the companion case, *Qwest Corp. v. City of Portland*, Civ. No. 05-1386-PA.

share resources such as fiber optic cable to help build IRNE's fiber network. *See* Or.Rev.Stat. § 190.110(1) (statutory authorization for IGAs).[2]

The City initially invested about $11 million in IRNE. The City obtained IRNE's physical facilities from different sources. For the conduit and aerial runs connecting IRNE's nodes, 43% were built by the City; 38% were acquired through the City's membership in the CTIC; 5% were built by the City with other public entities; 3% were built by the City with private telecommunications providers; and 11% were obtained from "in-kind" contributions made by private telecommunications providers under permits or franchise agreements. By length, about 9% of IRNE's fiber runs through underground duct obtained through in-kind compensation from private carriers.

IRNE does not use any in-kind duct obtained from TWT, QCC, or Qwest Corp. (The City previously used

2. The statute provides:

> In performing a duty imposed upon it, in exercising a power conferred upon it or in administering a policy or program delegated to it, a unit of local government or a state agency of this state may cooperate for any lawful purpose, by agreement or otherwise, with a unit of local government or a state agency of this or another state, or with the United States, or with a United States governmental agency, or with an American Indian tribe or an agency of an American Indian tribe. This power includes power to provide jointly for administrative officers.

conduit from QCC but no longer does so.) As part of its franchise agreement with QCC, the City purchased conduit from QCC for $15,000, which the City used to transmit IRNE and traffic control signals over the Ross Island Bridge.

Plaintiffs contend that IRNE should be prohibited from providing Ethernet high-speed data transmission services[3] to any entity other than the City itself. IRNE began offering its services to non-City governmental customers in mid-2002. IRNE's governmental customers sign five-year intergovernmental agreements with the City, but there are no penalties for ending service before the agreement date. For a 100 megabits per second (mbps) Ethernet connection, a customer pays IRNE about $530 per month, plus installation and on-site equipment. (A DS-1 line, by contrast, runs at 1.5 mbps.)

Currently, IRNE serves Multnomah County, the State of Oregon, Portland Public Schools, the Port of Portland, the Multnomah Educational Service District, the Metropolitan Service District (Metro), the City of Sherwood, the City of Hillsboro, the City of Gresham, and the U.S. Army Corps of Engineers. IRNE links the State Office Building, Portland Public Schools, the Multnomah Educational Service District, and Metro to a central location where high-speed connections may be made to any internet service provider. IRNE connects

3. IRNE provides voice service to the City only, not to third parties.

Multnomah County and the Port of Portland to the 911 Emergency Center and to the Portland Police headquarters and Multnomah County offices.

IRNE does not provide telecommunications services to any non-governmental third parties. The City does not solicit sales for IRNE. Counsel for the City stated at oral argument that the City has no ***1091** plans ever to offer services to non-governmental entities.

IRNE's governmental customers have found that IRNE provides improved telecommunications services at a competitive price. IRNE allows participating government agencies to share critical information, such as law enforcement files, efficiently and securely.

The City states that it received about $83,000 in revenue from IRNE for the last fiscal year. Plaintiffs dispute that figure, contending that the City should include revenue from the Institutional Net or I-NET, which provides high-speed transmission services to local schools and government agencies. The I-Net is authorized by statute. *See* 47 U.S.C. § 531(b) & (f).

The City states that the cable company Comcast Corp. (Comcast) built and owns the I-Net. Comcast did not use any in-kind underground duct or intergovernmental fiber in constructing the I-Net. The City and Comcast agreed that the City will manage the I-Net, while Comcast owns and operates the network itself. According to the City, I-Net generated about $1.055 million in revenues for the last fiscal year, of which

$650,000 went to the City and $405,000 went to Comcast. I-Net customers pay about $554 per month for each primary port per location. Out of that monthly payment, the City receives $314 for management and maintenance services, while $240 goes to Comcast for transmission over its system.

The City states that IRNE's customers generally purchase either an IRNE connection or an I-Net connection. Only the Portland Public School District, the Multnomah Educational Services District, and Multnomah County purchase both IRNE and I-Net connections. The I-Net connects 89 schools for Portland Public Schools and 72 schools for the Multnomah Educational Service District.

I conclude that the City may properly exclude I-Net revenue from IRNE's gross revenues. However, even if the I-Net revenue should be included, that would not change my legal rulings.

II. The Telecommunications Market in Portland

Twenty-one telecommunications providers, including plaintiffs, sell services in the Portland area under City franchise agreements or permits. Some franchise agreements, including TWT's, permit ubiquitous access to the City's rights of way, while other agreements, including QCC's, authorize the use of specific routes.

Appendix B

The City has never denied a franchise application to provide telecommunications services. No potential telecommunications provider has ever withdrawn an application because of the proposed terms of a franchise agreement with the City.

A. Time Warner Telecom (TWT)

TWT sells telecommunications services in more than forty metropolitan areas across the United States. TWT owns and operates a telecommunications system in Portland.

According to the City, TWT had gross revenues of $2.2 million in fiscal year (FY) 2002-2003; $3.7 million in FY 2003-2004; and $4.6 million in FY 2004-2005. Under the franchise agreement, TWT paid the City fees equal to 5% of TWT's gross revenues: $110,225 in 2002-03; $183,579 in 2003-04; and $231,357 in 2004-05. TWT will neither confirm nor deny the accuracy of the City's figures because TWT uses a different fiscal year than the City.

TWT's franchise agreement requires that TWT provide the City with in-kind underground duct if requested. TWT has not provided any duct to the City.

B. Qwest Communications Corp. (QCC)

QCC entered the Portland market in the 1990s, providing long-distance services. QCC had no revenues in Oregon in 2001 and 2002. QCC's revenues for one

quarter of 2003 were $4.7 million, and its revenues for 2004 were $15.2 million. QCC does not track its revenue separately for the Portland metropolitan area.

QCC and the City entered into a franchise agreement in 1997 that gave QCC the right to run its facilities from the west end of the Ross Island Bridge to downtown Portland. QCC pays the City an annual fee per foot of use, adjusted for inflation. According to the City, the most recent fee was about $3 per foot, for a total of about $38,000.

STANDARDS

The court must grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

DISCUSSION

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1. Standing

The City contends that plaintiffs lack standing to challenge IRNE. To establish standing, plaintiffs must

show that they have suffered an injury in fact because of the City's conduct, and that the injury would be redressed by a decision in their favor. *See On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1239 (9th Cir.2001). An injury in fact is " 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.' " *Lee v. State of Oregon*, 107 F.3d 1382, 1387 (9th Cir.1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Plaintiffs also must satisfy "the prudential component of standing; that is, [their] 'complaint must "fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." ' " *On the Green Apartments*, 241 F.3d at 1239 (citations omitted).

Here, the City contends that even if this court grants plaintiffs the relief they seek, plaintiffs could not compete with IRNE. I conclude, however, that plaintiffs have made a sufficient showing of standing because they are within the zone of interests protected by § 253(a).

II. Preemption

A. Section 253(a)

Section 253(a) prohibits state and local governments from imposing regulations that could bar the provision of a telecommunications service:

> No State or local statute or regulation, or other State or local legal requirement, may

> prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a). Section 253(a) preempts regulations that prohibit or *may* prohibit the provision of a telecommunications service. *See Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1256-57 (9th Cir.2006) (*City of Berkeley*). A regulation could violate § 253(a) even if the regulation has not actually prevented the provision of any telecommunications service. *See Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir.2004) (*City of Portland*), *cert. denied*, 544 U.S. 1049, 125 S.Ct. 2300, 161 L.Ed.2d 1089 (2005).

The court's analysis of a challenged regulation should not be completely divorced from economic reality. The court should consider a challenged regulation's actual economic effect on a carrier's ability to provide telecommunications services. As Magistrate Judge Ashmanskas noted in addressing a similar challenge, "what other benchmark would be used to determine whether a particular provision may have the effect of prohibiting a telecommunications provider from entering the market?" *City of Portland v. Electric Lightwave, Inc.*, 452 F.Supp.2d 1049, 2005 WL 4044333, *11 (D.Or. May 5, 2005) (*ELI*). I agree with Judge Ashmanskas that although a provider "is not required to make an actual showing that it is effectively prohibited from providing telecommunications services, it must at least demonstrate that the requirement is or

may be a 'barrier to entry into the City's telecommunications market.' " *ELI*, 452 F.Supp.2d at 1061, 2005 WL 4044333, *8 (quoting *City of Portland*, 385 F.3d at 1241).

If a plaintiff challenges more than one regulation, the court must consider the effect of the regulations both separately and in combination. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 (9th Cir.2001) (*City of Auburn*). Plaintiffs bear the burden of showing that § 253(a) applies.

B. Safe Harbor under § 253(b) and (c)

If, and only if, a regulation violates § 253(a), the court must then determine whether the regulation could be rescued by the statute's safe harbor provisions, § 253(b) and (c).

1. Safe Harbor under § 253(b)

The parties dispute whether the safe harbor provision of § 253(b) could apply here. On its face, § 253(b) applies to state, rather than local, legal requirements:

> (b) State regulatory authority
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and

> advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

The Tenth Circuit has held that § 253(b) applied to states and not to local governments. *See Southwestern Bell Wireless v. Johnson County Bd. of County Comm'rs,* 199 F.3d 1185, 1192 (10th Cir.1999). I conclude, however, that when "a state specifically delegated the state authority to its local governments," § 253(b) does apply to local governments. *Cox Commc'ns, PCS, L.P. v. City of San Marcos,* 204 F.Supp.2d 1260, 1264 (S.D.Cal.2002) (citation omitted).

Here, Portland City Charter gives the City, within its jurisdiction, the equivalent of the legislative powers of the State of Oregon. *See Sims v. Besaw's Café,* 165 Or.App. 180, 184-85, 997 P.2d 201, 203-04 (2000) (en banc). The State of Oregon allows cites to operate telephone systems: "When authorized by its charter . . . , a city may purchase, build, own, operate and maintain telephone or telegraph systems within or without its boundaries, for the benefit and use of its inhabitants at cost or for profit." Or.Rev.Stat. § 225.110. More generally, the State authorizes the City to own property for any "general benefit and use of the people within or without the city." Or.Rev.Stat. § 223.005(2). I conclude that the City is entitled to the protection of § 253(b).

2. Safe Harbor under § 253(c)

Section 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c). "This 'safe harbor' clause permits state and local government control over the use of the rights-of-way, so long as the control is management of the rights-of-way itself and not control of the telecommunications companies with facilities in the rights-of-way." *City of Berkeley*, 433 F.3d at 1256 (citing *City of Auburn*).

3. Safe Harbor Provisions as Affirmative Defenses

The Ninth Circuit has not determined whether the safe harbor provisions of § 253 create affirmative defenses, or whether the burden of proof remains on the plaintiff to show that § 253 applies. *Compare BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187-88 (11th Cir.2001) (§ 253(c) is an affirmative defense); *Qwest v. City of Santa Fe*, 380

F.3d 1258, 1272 n. 10 (10th Cir.2004) (accord) *with Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F.Supp.2d 886, 897 (S.D.Cal.2005) ("Consideration of section 253(c) is a necessary part of the preemption analysis, not a defense."). For this opinion, I assume that if plaintiffs show that a legal requirement violates § 253(a), the City then has the burden of showing that the requirement is rescued by § 253(b) or (c).

III. Applying § 253

A. The City's Operation of IRNE

Plaintiffs contend that the City exploits its power over the rights of way to compete illegally with private carriers in the market for governmental customers. Plaintiffs claim that the City's use of in-kind compensation from private carriers to create IRNE, and the City's intergovernmental agreement allowing the City to share resources with other governments, show that the City competes unfairly in operating IRNE. Plaintiffs contend that they cannot match the City's prices for telecommunications services because the City's expenses are artificially low.

The City responds that plaintiffs brought this action to stifle a successful competitor, using a statute that was enacted specifically to promote competition. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S.Ct. 1453, 1455, 161 L.Ed.2d 316 (2005) (Congress enacted Telecommunications Act of 1996 "to promote competition and higher quality in American

telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.' ") (citation omitted). The City contends its use of City resources to create and operate IRNE are not "regulations" or "legal requirements" subject to preemption under § 253(a).

Before addressing the merits of plaintiffs' challenge to IRNE, it is important to note that the City is permitted to compete with private carriers in the market for telecommunications services. The Federal Communications Commission (FCC) has encouraged the "participation of municipally owned entities" in the telecommunications business [to] " 'further the goal of the 1996 Act to bring the benefits of competition to all Americans. . . .' " *Nixon v. Missouri Municipal League*, 541 U.S. 125, 131, 124 S.Ct. 1555, 158 L.Ed.2d 291 (2004) (citation omitted). The wisdom of permitting local governments to compete with private carriers is not at issue here.

Plaintiffs contend that § 253(a) preempts the City's operation of IRNE, including the City's inter-governmental agreements to share resources with the State of Oregon and other government entities. Plaintiffs contend that "private carriers, such as TWT and QCC, have been unable to compete against the City in the City's chosen key market-government educational institutions-because of the City's below market prices which the carriers themselves subsidized." Pls.' Mem. in Supp. at 41.

Appendix B

The problem with plaintiffs' preemption argument is that § 253(a) does not apply to IRNE. Section 253(a) preempts any "State or local statute or regulation, or other State or local legal requirement" that may have the effect of prohibiting the provision of a telecommunications service. Plaintiffs fail to show that IRNE regulates plaintiffs or imposes legal requirements on plaintiffs. Although the City used in-kind compensation to create IRNE, none of the in-kind compensation came from plaintiffs. *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1180 (9th Cir.2006) (*City of Surprise*) ("Qwest suffers no injury when its competitors are subjected to additional, costly requirements"). In any event, the in-kind compensation does not form a significant part of IRNE's network.

Plaintiffs also contend that the City's intergovernmental agreements violate § 253(a). I agree with the City that plaintiffs may not attack the intergovernmental agreements because the other parties to those agreements are not parties in these consolidated actions. Even if plaintiffs could challenge the intergovernmental agreements, plaintiffs have failed to show how the agreements may prohibit the provision of a telecommunications service. The agreements simply allow the governments to share their resources, just as private companies may enter joint ventures or partnerships.

Even if the City's operation of IRNE could be construed as a regulation or legal requirement subject to preemption under § 253(a), plaintiffs have not shown

that IRNE has prevented plaintiffs or other private carriers from providing any telecommunications services. Plaintiffs have not shown why the City's sales to other governments may have the effect of prohibiting the provision of a telecommunications service. As I understand plaintiffs' argument, plaintiffs contend that if a government customer chooses to purchase telecommunications services from IRNE, plaintiffs or other private carriers have been "prohibited" from providing a telecommunications service to that customer. However, the loss of a potential customer is not equivalent to a legal restriction preventing the provision of a telecommunications service. As the City points out, while plaintiffs challenge IRNE's prices as artificially low, plaintiffs do not attempt to show why their own prices are higher than IRNE's.

Plaintiffs also have not shown why governmental customers constitute a relevant market, rather than a small fraction of the Portland market as a whole. Plaintiffs seem to view IRNE as a competitive juggernaut against which they are hapless victims. However, I accept the testimony of the City's expert, Alan Pearce, who stated that IRNE is not significant in the Portland market, that IRNE has "no market power, no opportunity to monopolize, no opportunity to predatory price. . . . It can't behave anticompetitively because it isn't big enough or powerful enough. It doesn't have deep pockets." Pearce Dep., 260-61, *quoted in* City's Mem. in Opp. 18.

Appendix B

Plaintiffs seem to treat § 253 as an antitrust statute that targets only state and local governments. Plaintiffs argue that the City, because of its status as a local government, has unfair competitive advantages over private carriers. It's true that unlike private carriers, the City may enter into intergovernmental agreements to share resources with other governments. (Of course, as noted, private carriers may enter into similar arrangements with other private carriers.) The City controls the public rights of way, and has the authority to grant franchises. However, federal law allows local governments to compete with private carriers, even though most if not all local governments enjoy these potential competitive advantages. Also, as the City points out, private carriers have their own competitive advantages over local governments.

I agree with plaintiffs that a local government may face a conflict of interest when it competes with private carriers in the market for telecommunications services. For example, a local government could abuse its authority to grant franchises to benefit itself as a competitor. *See Nixon*, 541 U.S. at 131, 124 S.Ct. 1555 ("in a business substantially regulated at the state level, regulation can turn into a public provider's weapon against private competitors"). However, plaintiffs have not presented evidence of such conduct here.

Plaintiffs have not shown how the City's operation of IRNE "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." My conclusion

is limited to the particular circumstances here, in which the City is selling telecommunications services only to other governments and public schools, and not to any private parties.

Even if the City's operation of IRNE could be construed as violating § 253(a), IRNE would be rescued by § 253(b), one of the two safe harbor provisions. Under § 253(b), the City may impose "on a competitively neutral basis . . . requirements necessary to . . . protect the public safety and welfare."

IRNE links various government offices, including law enforcement and emergency services, using secure, high-speed technology. IRNE connects transportation agencies, allowing better traffic control and responses to emergencies. IRNE provides public schools with low cost, high-speed telecommunications services. These uses show that IRNE helps to protect "public safety and welfare." (The State of Oregon, through the Department of Transportation, benefits directly from IRNE.) Even if IRNE runs afoul of § 253(a), it is saved by § 253(b).

B. Applying § 253 to Plaintiffs' Franchise Agreements

Plaintiffs contend that § 253(a) preempts provisions of their franchise agreements with the City.

Appendix B

1. Franchise Provisions Are "Legal Requirements"

The City contends that § 253(a) does not apply to franchise agreements because the agreements are not "regulations" or "legal requirements," but contracts voluntarily executed by the parties. Plaintiffs respond that the City approves each franchise agreement through a City ordinance.

I conclude that a private carrier may challenge a franchise agreement under § 253. Otherwise, a local government might try to shield an onerous restriction from challenge by placing the restriction in the franchise agreement rather than imposing it through a regulation.

I also conclude that plaintiffs are not estopped from challenging the franchise agreements, and that section 19.9 of QCC's franchise agreement does not limit QCC to challenging only section 3.1 of its franchise agreement.

2. In-Kind Compensation Provisions

Plaintiffs challenge the provisions in their franchise agreements requiring them to make in-kind contributions to the City.

Appendix B

a. TWT's In-Kind Provisions

TWT's agreement provides:

> Section 9. USE OF NETWORK CAPACITY AND DUCTS BY CITY.
>
> 9.1 Upon written request from the City, Grantee shall provide conduit and/or lit optical fiber network connections to the City, for municipal purposes.
>
> 9.2 (A) *Ducts.* In the case of any new construction by the Grantee in the Streets, after prior notice to and upon written request from the City, Grantee shall install for the City one duct for each duct that Grantee installs, up to four ducts, or one single four-inch (4") duct, for municipal purposes. The cost of such ducts may not be deducted from Franchise fees payable to the City, or otherwise be charged to the City. Upon completing installation and construction of the ducts in the City Streets, Grantee shall submit to the City a deed or other form of ownership documentation for such ducts.

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(B)(1) *City Use of Surplus Ducts or Conduits.* The City may install or affix, and maintain wires and equipment for municipal purposes within any of Grantee's surplus ducts or conduits, as defined in Section 12.1(E). Grantee shall not be responsible for any damage resulting to the wires or property of the City occurring as a result of the City's use of Grantee's surplus ducts or conduits. The City shall not have access to Grantee's surplus ducts and conduits without Grantee's prior approval, except in the event of an emergency requiring that the City obtain immediate access to those conduits or ducts. In such an emergency, the City shall exercise its best efforts to notify the Grantee as soon as possible of the emergency and the City's need for immediate access. All work to attach, install, and/or maintain City wires and equipment in such surplus ducts shall be performed by Grantee, at City expense, at a charge not to exceed Grantee's direct incremental costs of material and labor plus ten percent (10%). Grantee's charges for attaching, install or maintaining such City wires and equipment may be

> deducted from Franchise fees payable to the City, or may otherwise be separately charged by the Grantee to the City.
>
> (2) The value of the City's use of Grantee's surplus conduits or ducts shall not be charged to the City, or be deducted from Grantee's Franchise fee, or other fees or charges payable to the City.

The TWT franchise agreement defines "municipal purposes" to exclude "(1) the sale or lease of telecommunications services to third parties; (2) the transfer of any rights by the City to third parties for the purpose of providing the City with access to interexchange carriers. . . ." TWT Franchise Agreement, § 9.4.

I conclude that the in-kind provisions of TWT's agreement are preempted by § 253(a). *See ELI*, 452 F.Supp.2d at 1064-65, 2005 WL 4044333, *11. The in-kind provisions are open-ended, requiring that TWT provide conduit or fiber optic network connections "[u]pon written request from the City." Because the in-kind provisions leave so much to the City's discretion, TWT cannot plan for the cost of providing in-kind compensation. The provisions are preempted even though, as in *ELI*, the City has not actually obtained any in-kind compensation from TWT.

I also conclude that the in-kind provisions in TWT's agreement are not rescued by § 253(c). A properly limited in-kind compensation provision could be considered to be "fair and reasonable compensation from telecommunications providers . . . for use of public rights-of-way." 47 U.S.C. § 253(c). However, the possible in-kind compensation the City may demand from TWT is not limited.

b. QCC's In-Kind Provisions

QCC's agreement provides:

> Section 9. CITY USE OF DUCTS.
>
> 9.1 *Ducts Provided to City in City Streets.* Grantee shall install for the City two two-inch ducts to be reserved for municipal purposes as part of Grantee's construction in City Streets as shown on the map attached to this Franchise as Exhibit A. Upon completing installation and construction of the two two-inch ducts in the City Streets, Grantee shall submit to the City a deed or other form of documentation indicating City ownership of such ducts.
>
> 9.2 *Ducts Provided to City Across Ross Island Bridge.* Grantee shall

> install two one and one-quarter inch ducts for the City across the Ross Island Bridge. In consideration for providing these ducts to the City, Grantee may take a one-time credit against the Franchise fees of up to Fifteen-thousand Dollars ($15,000) of Grantee's actual and direct material costs of providing the ducts to the City. Upon submitting documentation to the City that it is taking this credit against compensation paid, or to be paid, under Section 3.1 of this Franchise, Grantee shall also simultaneously submit to the City a deed or other form of ownership documentation for the ducts.

QCC's franchise agreement defines "municipal purpose" to exclude "the sale or lease of Telecommunications Services to third parties."

Unlike the in-kind provisions in TWT's agreement, the in-kind provisions in QCC's agreement are not open-ended. Instead, they are a one-time requirement. The in-kind provisions do not give the City broad discretion to require additional in-kind compensation.

Plaintiffs have not shown that in-kind compensation provisions are per se preempted. As the City notes, local governments for many years have used similar in-kind

compensation provisions in utility franchise agreements. I conclude that the in-kind provisions in QCC's franchise agreement do not run afoul of § 253(a). Even if the in-kind provisions did violate § 253(a), I would conclude that they are rescued by § 253(c) as reasonable compensation for use of the City's rights of way.

3. TWT's Franchise Fee Based on Gross Revenues

TWT's franchise agreement with the City requires that TWT pay annual fees based on 5% of TWT's gross revenues. The City places proceeds from the gross revenue fee in the City's general fund.

I conclude that this court lacks subject matter jurisdiction over TWT's challenge to the 5% gross revenue fee because the fee is a tax. Even if the gross revenue fee is subject to preemption, it survives as reasonable compensation for use of the City's rights of way.

a. The Gross Revenue Fee is a Tax

The Tax Injunction Act, 28 U.S.C. § 1341, forbids federal district courts from enjoining, suspending, or restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." To determine whether a particular charge is a tax, the court should consider "(1) the entity that imposes the charge; (2) the parties upon whom the charge is imposed; and (3) whether the charge is expended for general

public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed." *City of Surprise*, 434 F.3d at 1183 (citing *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir.1996)).

Applying the *Bidart* test, I conclude that the 5% gross revenue fee (regardless of its label) is a tax because the City places proceeds from the fee in its general fund. When "an ordinance requires that a telecommunications provider pay a percentage of its gross revenues to the municipality, and the revenue from that charge is directed to the municipality's general fund, the charge constitutes a tax." *City of Surprise*, 434 F.3d at 1184. If TWT's challenge to the gross revenue fee was successful, it would "reduce the flow of [City] tax revenue." *Id.* (citing *May Trucking Co. v. Oregon Dep't of Transp.*, 388 F.3d 1261, 1267 (9th Cir.2004)).

Even if the Tax Injunction Act did not deprive this court of subject matter jurisdiction, the Telecommunications Act itself provides that taxes are not subject to preemption. *See City of Surprise*, 434 F.3d at 1183 n. 3.

b. The Gross Revenue Fee Is Not Preempted

Even if the gross revenue fee is not a tax, it is not preempted by § 253. Plaintiffs have failed to show that the 5% fee may have the effect of prohibiting the provision of any telecommunications service. The record

indicates that there are more than twenty carriers in the Portland area, some of which are subject to the 5% gross revenue fee. *See ELI*, 452 F.Supp.2d at 1062, 2005 WL 4044333, *8 ("at least 13 other telecommunications companies are paying an identical 5% fee").

Even if the 5% fee could be considered to violate § 253(a), I agree with Judge Ashmanskas that the fee is rescued by § 253(c) because it is "fair and reasonable compensation" for TWT's use of the City's rights of way. *ELI*, 452 F.Supp.2d at 1068-75, 2005 WL 4044333, **15-22. I adopt Judge Ashmanskas's extensive and thoughtful analysis of this issue.

4. QCC's Franchise Fees Based on Usage

QCC's franchise agreement, at section 3.1, requires that QCC pay annual fees based on per-foot usage, adjusted for inflation. The most recent rate was about $3 per foot, which amounted to about $38,000 for the past year.

Plaintiffs contend that the fee provision violates § 253(a) because the fee is not tied to the actual cost of using the rights of way. I disagree. Plaintiffs have not shown that the $3 per foot fee may have the effect of prohibiting the provision of any telecommunications service. To put this issue in perspective, QCC paid the City a franchise fee of about $38,000 for the last fiscal year. In the most recent year for which figures are available, QCC earned more than $15 million in revenues from sales in the Portland area.

Second, even if the usage fee violates § 253(a), it is rescued by § 253(c), which allows cities "to require fair and reasonable compensation from telecommunications providers." The key word is "compensation." I conclude from the legislative history and the wording of the statute that "compensation" in this context is not limited to the actual cost of using the rights of way. Again, I adopt Judge Ashmanskas's well-reasoned analysis of this issue. *See ELI*, 452 F.Supp.2d at 1068-69, 2005 WL 4044333, *15.

Plaintiffs argue that the City charges carriers different fees for using the rights of way. Plaintiffs contend that Qwest Corp. pays 7% of exchange access revenue, which results in a fee that is less than 5% of Qwest Corp.'s gross revenues.

The City is not required to impose identical franchise fees on private carriers that use the City's rights of way differently. *See Cox Communications PCS, L.P. v. City of San Marcos*, 204 F.Supp.2d 1260, 1269-70 (S.D.Cal.2002). The City's agreement with Qwest Corp., the incumbent service provider, is different from its agreement with QCC, so there is a valid reason to treat the two carriers differently.

5. Most Favored Rate Provisions

Both franchise agreements contain provisions, found at section 3.2 of the agreements, that require the franchisee to provide telecommunications services to the City on request at the franchisee's "most favorable rate

offered at the time of the request charged to a similar user within Oregon for a similar volume of service. . . ."

Judge Ashmanskas concluded that a nearly identical "most-favored-rate" provision was preempted because "there are no restrictions on the extent or amount of services that may be required by the City. Rather, pursuant to section 3.2, it appears that ELI must be prepared at all times to provide the City with whatever service [it requests], at a most-favored rate." *ELI*, 452 F.Supp.2d at 1063, 2005 WL 4044333, *9.

I agree with Judge Ashmanskas that the most-favored-rate provisions at issue here allow the City too much leeway and therefore violate § 253(a). I also agree with Judge Ashmanskas that the most-favored-rate provisions are not saved by § 253(c) because the provisions are not sufficiently related to the City's management of its rights of way. *ELI*, 452 F.Supp.2d at 1068-69, 2005 WL 4044333, *15.

6. Non-Monetary Franchise Provisions

Plaintiffs challenge non-monetary franchise provisions and sections of the Portland City Charter and the Portland City Code.

Plaintiffs challenge section 16 of their franchise agreements, which gives the City discretion to revoke or amend the franchise; section 18, which gives the City discretion to renew a franchise; and section 1.3, requiring that the franchisee unconditionally accept terms of the franchise.

I conclude that the challenged non-fee requirements in plaintiffs' franchise agreements are not preempted. Franchise agreements are mutually binding contracts between the City and the franchisee. The City's discretion in enforcing these provisions is limited by the implied duty of good faith and fair dealing, which Oregon law implies in every contract. *See ELI*, 452 F.Supp.2d at 1065-66, 2005 WL 4044333, *12. As Judge Ashmanskas noted, the franchise agreements requires that the City and the franchisee comply with all applicable state and federal law. The City must comply with the Federal Telecommunications Act when it decides, for example, whether to renew a franchise (section 18).

None of the challenged non-fee provisions violates § 253(a). Section 16 of the franchise agreements includes monitoring, enforcement, and penalty provisions. Because the City may require a franchise agreement to use the City streets, it follows that the City is entitled to enforce the terms of the franchise agreement. Otherwise, a franchisee could breach a franchise agreement with impunity. Section 16 itself includes checks on the City's ability to apply it, such as a requirement that the City not impose forfeiture or penalties if there is a good faith dispute, and a requirement that the franchisee receive notice and an opportunity to cure the alleged breach.

Section 1.3 of the franchise agreements provides that the franchise agreement is effective only if the franchisee unconditionally accepts it within thirty days of its offer, and that the franchise is null and void if it is

not accepted. I agree with the City that this provision is in accord with black letter contract law, and is not a prohibition.

The challenged City Charter provisions include section 2-107, which allows the City to punish violations of a franchise agreement; and section 10-211, which allows the City to place "conditions or restrictions" in a franchise agreement. These general provisions do not violate § 253(a). The City Charter provisions were not adopted specifically for telecommunications providers. In *City of Portland*, the Ninth Circuit expressed doubt whether § 253 applied to regulations or legal requirements "that are not specific to the telecommunications process." 385 F.3d at 1242. I conclude that § 253(a) does not apply to these Charter provisions.

Even if the non-fee provisions violate § 253(a), they are rescued by the safe harbor provision of § 253(c) because they directly relate to the City's management of its rights of way. Section 1.3 requires that the franchisee execute the franchise agreement before the franchisee may occupy the City's streets. Section 16 sets remedies for breaches of the franchisee's obligations in using the streets. Section 18 sets procedures for the expiration of the franchisee's authorization to use the rights of way.

7. Severability

I conclude that the preempted provisions are severable from the franchise agreements. Both franchise agreements contain severability provisions. *See* TWT Franchise Agreement, § 20.2; QCC Franchise Agreement, § 19.2. I conclude that the preempted provisions are severable because the franchise agreements remain enforceable without those provisions. *See ELI*, 452 F.Supp.2d at 1075-76, 2005 WL 4044333, **22-23.

IV. Section 1983 Claim Based on § 253

Plaintiffs bring a claim under 42 U.S.C. § 1983 based on the City's violations of 47 U.S.C. § 253. I grant the City's motion for summary judgment on this claim.

The Ninth Circuit has not decided whether § 253 creates a private remedy under § 1983. In *Qwest v. City of Santa Fe*, 380 F.3d 1258, 1265-67 (10th Cir.2004) (*Santa Fe*), the Tenth Circuit held that neither the text nor the structure of 47 U.S.C. § 253 indicated an intent to create a private right of action under § 1983. The Tenth Circuit reasoned that "the language of the statute is not focused on the benefits granted to the telecommunications providers. Instead the statute focuses on restricting the type of telecommunications regulations a local authority may enforce." 380 F.3d at 1265.

I agree with the Tenth Circuit's reasoning in *Santa Fe* that § 253 should not be construed to create a private right of action under § 1983.

V. Commerce Clause Claim

Plaintiffs contend that the City's operation of IRNE violates the Commerce Clause of the U.S. Constitution. Plaintiffs argue that a regulation which incidentally affects interstate commerce runs afoul of the Commerce Clause if "the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (citation omitted). Plaintiffs argue that the City has created a monopoly over the market for government services.

Plaintiffs have failed to show that IRNE imposes an excessive burden on interstate commerce. As noted, IRNE commands only a fraction of the Portland market for telecommunications services. I grant the City's motion for summary judgment on plaintiffs' Commerce Clause claim.

VI. Other Claims

Plaintiffs also bring claims for a takings in violation of the Fifth Amendment, violations of due process, and unjust enrichment. I grant the City's motion for summary judgment on these claims.

Although I conclude that the in-kind provision in TWT's agreement and the most-favored-rate provisions in both agreements are preempted, neither plaintiff had property taken without due process as a result of these provisions. The City never tried to exercise its rights under the preempted provisions.

Given this court's rulings on plaintiffs' other claims, I grant summary judgment on plaintiffs' unjust enrichment claim.

THE CITY'S MOTION FOR SUMMARY JUDGMENT

The City seeks summary judgment on its counterclaims against TWT and QCC for alleged breaches of agreements with the City.

I. City's Claims Against TWT

The City contends that TWT has failed to pay all of the fees due under the franchise agreement. The franchise agreement requires that TWT pay the City a fee equal to 5% of TWT's gross revenues earned from telecommunication services in the City. The City contends that TWT is unilaterally excluding revenues that TWT earns from "information services." The City contends that these excluded services should be considered "telecommunication services" that are covered by the franchise agreement.

Appendix B

The franchise agreement provides that "gross revenues" are derived from "the provision of Telecommunications Services." TWT Franchise, § 3.1. The agreement defines "telecommunications services" in part as "[s]ervices interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services, for the purpose of voice, video, or data transmission." TWT Franchise, § 2.11(D). It also includes a catch-all definition: "Other telecommunications services as authorized by the Federal Communications Commission or the Oregon Public Utility Commission." *Id.*, § 2.11(F).

I conclude that material issues of fact preclude granting summary judgment on the City's counterclaim against TWT. The City has not shown as a matter of law that TWT breached the franchise agreement by *1103 excluding revenues from information services.

II. City's Claims Against QCC

The City contends that QCC breached three provisions of its franchise agreement with the City.

First, the City contends that under section 9.1 of the QCC franchise agreement, QCC was to build underground ducts for the City, and to provide the City with "a deed or other form of documentation indicating City ownership of such ducts." According to the City, QCC built the duct but never provided the City with deeds.

Appendix B

The City contends that section 9.2 of the franchise agreement with QCC required QCC to "install two ... ducts for the City across the Ross Island Bridge" and provide the City with a deed for the duct. According to the City, QCC constructed the duct but has not provided a deed.

The City also contends that QCC has denied the City access to ducts that it installed for the City across the Ross Island Bridge. The City states that QCC built two small ducts inside a QCC conduit.

I grant the City's motion for summary judgment on its counterclaims against QCC, while reserving the question of the amount of damages. Because I have concluded that the in-kind compensation provisions in QCC's franchise agreement are valid, QCC's failure to comply with those provisions breached the agreement.

CONCLUSION

Plaintiffs' motion for summary judgment (# 76) is granted as to the in-kind compensation provision in TWT's franchise agreement, and the most-favored-rate provisions in both franchise agreements, and otherwise denied. The City's motion for summary judgment (# 82) is granted, except as to TWT's in-kind provision and the most-favored-rate provisions, and the City's counterclaim against TWT.

The City's motion to strike (# 121) is denied as moot.

APPENDIX C — RELEVANT LOCAL LEGAL REQUIREMENTS

CITY OF PORTLAND ORDINANCE NO. 171566 [EXCERPTS]

Grant a franchise to GST Telecom Oregon, Inc. for a period of ten years.

The City of Portland ordains:

* * *

Section 3. COMPENSATION AND AUDITING.

3.1 *Amount of compensation.*

(A) As compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City, the Grantee shall pay as a Franchise fee to the City, through the duration of this Franchise, the greater of either: (a) the Minimum Annual Franchise Fee; or (b) an amount equal to five percent (5%) of the Grantee's Gross Revenues. However, revenues derived from the sale or lease of facilities and subject to Subsection 3.1(B), shall be excluded from the Gross Revenues calculation of franchise fees under this Subsection 3.1(A).

Appendix C

(B) As additional compensation to the amounts set forth in Subsection 3.1(A):

(1) In the event Grantee sells any portion of its Tele-communications System, Grantee shall pay a one-time Franchise fee to the City of one percent (1%) of the sales price; and,

(2) In the event Grantee leases any portion of its Tele-communications System, Grantee shall pay a Franchise fee to the City of one percent (1%) of the lease revenues.

(3) The calculations of the one percent franchise fee on sale and lease revenues shall be calculated under the following formula:

Franchise fee = (.01) X Ts X (Fp÷Ft), where:

Ts = Total sales price or periodic lease payments for the facility, expressed in Dollars/ fiber-miles;

Fp = the length of the facilities sold or leased, located within the

City, expressed in fiber-miles; and,

F't = the total length of the facilities sold, expressed in fiber-miles.

An illustrative example of this calculation would be as follows: Out of a fiber optic bundle of twenty four (24) fibers in a forty mile loop, Grantee sells two (2) fibers to a purchaser for a total sales price of five hundred thousand dollars ($500,000). Ten miles of the fiber optic loop are located with the City of Portland. The calculation would be as follows: Franchise fee = (.01) X $500,000 X (10÷40)) = $1,250.

* * *

Section 9. USE OF NETWORK CAPACITY AND DUCTS BY CITY.

9.1 Upon written request from the City, Grantee shall provide conduit and/or lit optical fiber network connections to the City, for municipal purposes.

Appendix C

PORTLAND CITY CHARTER [EXCERPTS]

Section 2-105 Continuation of Specific Powers.

The City of Portland by its Council has power and authority, subject to the provisions, limitations and restrictions contained in this Charter or in statute, to exercise any power or authority granted to the City by statute, general or special, or by this Charter, and may do any other act necessary or appropriate to carry out such authority, or exercise any other power implied by the specific power granted.

(a) Among such specific powers, the City has power and authority:

* * *

24. To provide or require conduits under the streets, lanes, alleys and public places of the City or any part or parts thereof for the use of telephone, telegraph, electric light and other wires, or for other purposes, either by constructing said conduits itself or authorizing or requiring their construction by others upon such terms and conditions as the Council may impose, and to regulate and control the use of such conduits, and to prescribe and establish reasonable rentals to be paid by any person or company using any of said conduits by whomsoever the same may be constructed for the use thereof, and to provide for the collection of such rentals, in addition to the ordinary processes, by such summary methods as it may deem proper. If any such grant be

made to any person, firm or corporation, such grantee shall not have power to sublet the same or the use of the same to any person, firm or corporation engaged in selling, hiring, leasing or otherwise receiving any income from the business or purpose for which it desires to use such conduits, without such person, firm or corporation first obtaining, as provided in this Charter, a franchise for such business, purpose or use.

Section 2-107 Punishment for Ordinance Violations.

The Council has power and authority, subject to the provisions, limitations and restrictions contained in this Charter, to provide for the punishment of a violation of any ordinance of the City by a fine or by imprisonment, or by both. Such imprisonment shall be for a term not exceeding six (6) months. In addition to the foregoing penalties, forfeiture of property or license of any kind may be provided. The limitations as to length of sentence contained in this Section shall not apply to any offense for which different limitations are fixed elsewhere in this Charter.

Section 10-207 Method of Granting.

Every franchise shall be embodied in an ordinance, which shall contain all the terms and conditions of the proposed grant, and shall be filed with the Auditor. Thereupon such proposed ordinance shall be published in full, once in the City official newspaper. There shall also be published, in a conspicuous place in such daily

newspaper of the City having a circulation in excess of fifteen thousand (15,000), as the Council may direct, a notice prepared by the Auditor, that an application has been made for a franchise, giving the name of the applicant, the character and location of the proposed grant, and requesting any person having any objections to such proposed franchise or any provisions thereof to file the same in writing with the Auditor within twenty (20) days from the first publication of such notice. If the request is made therefor, the Council shall fix a time for a hearing upon such objections and give reasonable notice of the time thereof and not less than five (5) days. All of such publications and notices shall be at the expense of the applicants for such franchises.

Such ordinances shall not come up for first reading until after the expiration of the said twenty (20) days.

If such ordinance shall be amended, it shall be republished in the City official newspaper in full as amended.

No such ordinance granting a franchise shall be put on final passage within thirty (30) days after the first reading nor within twenty (20) days after any amendment thereto, and the affirmative vote of four (4) Commissioners shall be required to pass the same.

Appendix C

Section 10-210 Conditions and Restrictions.

Every franchise granted by the City shall be subject to the conditions and restrictions hereinafter provided, to wit:

* * *

(d) No franchise shall be granted without fair compensation to the City therefor, either by way of direct payment or by reduction of rates, fares or charges, and in addition to the other forms of compensation to be therein provided, the grantee may be required to pay annually to the City such part of its gross receipts as may be fixed in the grant of said franchise. This provision shall not exempt the holder of the franchise from any lawful taxation upon its property nor from any license, charge or imposition not levied on account of such use.